European education in the 21st future

EUROPEAN EDUCATION IN THE 21ST CENTURY

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1. Introduction

The 20th century is drawing to its close. For this reason, even more than usual, the pondering upon and solving of problems requires not only the consideration of the near future or the next decade, but a further projection into the future: into the next century. This perception, which I would like to characterise as a positive "fin de siècle"-attitude, also serves its purpose, if we want to discuss potential developments in legal education. What will legal education in Europe be like in forty to fifty years? How will the professors and students of those days look back upon the legal education which we are giving to our own students now? And in what way are we, through revisions of our legal education, able to anticipate possible future developments?

Such futuristic considerations about legal education are, of course, speculative. We do not know which positive and negative events are pending for the world in general and Europe more in particular. The astonishing political events in the years 1989 and 1990 have again demonstrated that the path of history can sometimes take some unexpected turns. Nevertheless it is useful to point out a number of tendencies which are extremely likely to influence the law of the European states and which will have direct consequences for the way in which European lawyers are educated. Reflecting upon these tendencies, it is not too difficult to put forward a number of predictions about law in future Europe as well as European legal education in the future. I distinguish three clear developments: a) the unification and harmonisation, respectively, of (important parts of) the law; b) the obligation to recognise qualifications which have been obtained "abroad within Europe" and which enable a legal profession to be practised; c) the possibility, which also exists for law students, to follow part of their studies at a foreign university. I would like to pay closer attention to each of these three, already apparent, tendencies.

2. The increasing unification/harmonisation of the law of the European countries

To observe that the legal systems of Europe are converging states the obvious. [1] Sometimes this is the result of attempts to unify and harmonise, respect-

1. See, generally, Heinz-Peter Mansel, Rechtsvergleichung und europaïsche Rechtseinheit, Juristenzeitung 1991, 529-534.

ively, at worldwide level. The UN-Convention on International Contracts of Sale, signed in Vienna in 1980,[2] is a recent example of this phenomenon.

Often the convergence of the various legal systems is the consequence of the increasing influence which the developing protection of human rights exerts upon the contents of legal systems. To be mentioned in this respect are the International Convention on Civil and Political Rights[3] and the International Convention on Economic, Social and Cultural Rights[4] as well as, at the European level, the gigantic consequences of the European Convention on Human Rights.[5] Did not the Marckx-judgment of the European Court of Human Rights[6], by being founded upon principles which were completely new to some states, push the family law of a great number of Member States of the Council of Europe in a completely different direction?[7] The Marckx Case, applying human rights, excommunicated rules of the law of descent that were considered typical[8] of the legal systems belonging to the Romanistic legal family. The decision caused the family law of the Member States of the Council of Europe to assimilate more than before.

2. Vienna, 11 April 1980, Tractatenblad 1981, 184 and 1986, 61.
3. New York, 19 December 1966, Tractatenblad 1969, 99 and 1978, 177.
4. New York, 19 December 1966, Tractatenblad 1969, 100 and 1978, 178.
5. Rome, 4 November 1950, Tractatenblad 1951, 154; c.f. Jochen Abraham Frowein, Der europaïsche Menschenrechtsschutz als Beginn einer europaïschen Verfassungsrechtsprechung, Juristische Schulung 1986, 845-851.
6. Marckx v Belgium, 13 June 1979, Series A no. 31.
7. In his dissenting opinion Sir Gerald Fitzmaurice described the decision as "a whole code of family law". See, on the significance of the *Marckx Case* for the harmonisation of family law in Europe: Alfred Rieg, L'harmonisation europeénne du droit de la famille: mythe ou réalité, in: Conflits et harmonisation, Mélanges en l'honneur d'Alfred E. von Overbeck, Fribourg 1990, 484, 485.
8. See Para. 8 in: Konrad Zweigert/Hein Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, Band I, Tübingen 1971, which carried the title, "Die Rechtsstellung unehelicher Kinder - Stilprägendes Merkmal der romanischen Rechte". In the English translation of the second edition of this work (translator: Tony Weir, Oxford, 1987) the text of this tenth paragraph "The legal position of illegitimate children - a distinctive feature of the Romanistic legal family" does not appear; the translator refers the reader to the translation of the first edition.

Undeniably the greatest stimulus for the unification and harmonisation of law in Europe stems from the European Community. [9] In the process of creating a common market, ever-increasing parts of the law of the Member States are unified by regulations, or harmonised by directives. [10] The European Community has taken a very active role in the field of commercial and company law [11], as is demonstrated by the numerous directives concerning incorporated and unincorporated legal bodies. [12] Ever-increasing is also the influence which EEC-legislation exerts upon other aspects of private law. In this respect should be mentioned: the Directive on Product Liability, [13] the draft Directive on Consumer Protection [14] and the draft Directive on Liability for Defective Services [15]. It is extremely likely that the immediate future will reveal even more attempts at harmonisation or even unification of private law, not only in the law of obligations, but also in property law, more particularly in the field

9. Thomas Oppermann, Europarecht, 1991, 6 I 2b; Hayder, Neue Wege der europaïschen Rechtsangleichung? Rabels Zeitschrift 1989, 622; Heinz Peter Mansel, Juristenzeitung 1991, 530-532.
10. See, generally, Heinz Peter Mansel, Juristenzeitung 1991, 530 and Erik Jayme / Kohler, Das internationale Privat- und Verfahrensrecht der EG auf dem Weg zum Binnenmarkt, IPRax 1990, 354.
11. See L. Timmerman, De stand van het vennootschapsrecht, Deventer 1990, 7: "De EEG-Richtlijnen zijn zo belangrijk, omdat Nederland voor het vennootschapsrecht inmiddels de status heeft van een Europese provincie met beperkte autonomie."
12. C.f. R. Goerdeler, Überlegungen zum künftigen Gesellschaftsrecht in der EG, in: Festschrift für Ernst Steindorff (1990), 1211-1228; Y. Guyon, La coordination communautaire du droit français des sociétés, Revue trimestrielle du droit européen 1990, 242; Christoph E. Hauschka, Die Tätigkeit der Europaïschen Gemeinschaft im Gesellschaftsrecht zwischen Rechtsvergleichung und Funktionen allgemeiner Gesetzgebung, ZRP 1990, 179; Hauschka, Der Stand der gemeinschaftsrechtlichen Rechtsangleichung im Recht der privaten Wirtschaft drei Jahre vor Vollendung des Binnenmarktes 1992, Neue Juristische Wochenschrift 1989, 3048; Hauschka, Grundprobleme der Privatrechtsfortbildung durch die Europaïsche Wirtschaftsgemeinschaft, Juristenzeitung 1990, 524; Marcus Lutter, Stand und Dynamik des europaïschen Wirtschaftsrecht (Zentrum für Europaïsches Wirtschaftsrecht, Vorträge und Berichte Nr. 1, Bonn 1990) 22; Peter-Christian Müller-Graff, Privatrecht und europaïsches Gemeinschaftsrecht, Festschrift Börner, 1987, 13.
13. Official Journal L 210/29 of 7 August 1985.
14. Published, in part, in ZIP 1991, 200.
15. Official Journal C 12/8 of 18 January 1991; see also NJB 1991, 687, 688. See, on this topic, J. Spier, Wederom: de EEG en gebrekkige diensten, Nederlands Juristenblad 1991, 663-665.

of security. Semi-official attempts to draft a uniform European law of contract [16] and a uniform European law on civil procedure [17] underline these tendencies towards unification and harmonisation.

It should be emphasised that the efforts to achieve unification and harmonisation made by the European Community are certainly not restricted to private law. The termination, as a result of the Schengen Agreement, of the practice of checking persons at the inner borders of the European Community has resulted in a clamour that the criminal law and the law on criminal procedure should be - at least to a certain extent - harmonised. [18] In the area of administrative law, too, tendencies towards harmonisation can be perceived, for example in social security law. Furthermore, it would not surprise me if the general provisions of administrative law, albeit partly, were to follow suit. [19] Will areas like the law of personal status and family and inheritance law also, in the course of time, be influenced by European Community legislation? It seems not unlikely to me. [20] The ever-increasing mobility of the European citizens results in growing irritation about the discrepancies which exist between the various legal systems in these areas of law. Private international law provisions which are often unified by treaties offer little help in this respect. The rule, appearing with ever-increasing frequency in such treaties, which makes, instead of nationality, the place of residence the decisive factor is sometimes even pouring oil onto already troubled waters. By making use of

16. The reader is referred, in the first place, to the Commission on European Contract Law (Chairman: Ole Lando), discussed in more detail below. Secondly, attention is drawn to the initiative of Gandolfi, at Pavia, (Italy): the conference on the possibility of creating an European contract law; on this initiative, see Martin Posch: Konferenz zu einer europäischen Kodifikation des Vertragsrechts, Neue Justiz 1991, 70.
17. C.f. Marcel Storme, Pleidooi voor een Europese codificatie: Thibaut of von Savigny, Kwartaalbericht NBW 1989, 97-101.
18. Compare about the possibility of a Model Penal Code for Europe: Memorandum prepared at the request of the Legal Affairs Committee of the Council of Europe (Amsterdam 1971), published in Ch.J. Enschedé, Een uniform Europees strafrecht? Over grenzen en nationale identiteit, Arnhem 1990.
19. Principles are also developing at the level of constitutional law, see: Jochen Abraham Frowein, Die Herausbildung europäischer Verfassungsprinzipien, Festschrift Maihofer (1988), 150; Frowein, Juristische Schulung 1986,845; Erik Jayme, Ein internationales Privatrecht für Europa, Heidelberg 1991, 22 note 70.
20. C.f. the conclusions of Alfred Rieg, L'harmonisation européenne du droit de la famille: mythe ou réalité, in: Conflits et harmonisation, Mélanges en l'honneur d'Alfred E. von Overbeck, Fribourg 1990, 498, 499; contrariwise Erik Jayme, Ein Internationales 'rivatrecht für Europa, Heidelberger Forum Band 70, Heidelberg 1991, 8,9.

the freedom of movement the place of residence changes and therefore often the applicable law. [21]

The question can be asked whether we should feel content, in every respect, with the growing waves of unification and harmonisation within the European Community. Are we not going too far in Europe with the unification of laws? Does not the example of the United States show us that a common market and even political unity can be achieved through a much lower degree of unification and harmonisation? However justified it is to raise this question, the answering of it is, for our present purposes, less necessary. It is important for us to establish that the EC endeavours towards unification and harmonisation cover an increasing number of fields of law. An interesting point to be stated in this respect is that sometimes harmonisation takes place with regard to subjects which have not been through such a process in the United States. It may be that the need for unification in Europe is so much greater than in the United States, because here, in contrast with the latter, there is less of a common legal culture.

In our consideration of the tendencies of harmonisation and unification within the European Community, it cannot pass unmentioned that the number of Member States will increase considerably in the next decades. This is particularly due to the drastic changes in Eastern Europe since 1989. I think that it would not be going too far to suggest that by the year 2030 all European countries will either be a member of the European Community or will co-operate extremely closely with this organisation. For our present purposes there is not much point in speculating whether at that time there will be a United States of Europe with a federal, alongside local, legal systems. For the present it suffices to say that it is likely that the legal systems of the European States will form one great legal family with uniform or strongly similar rules in many areas.

21. The draft Convention on the Law Applicable to Estates provides, in this connection, a good illustration: If an Italian migrant works in Belgium, and there marries a Spanish migrant, after ten years moves to live and work in the Netherlands, after fifteen years moves to Germany and spends his last years in Italy, then Italian, Belgian, Dutch, German, and again Italian law are successively applicable to the question of how his estate devolves. If his widow subsequently goes to Spain then, after a period of time, her estate will be subject to Spanish law. Some decades ago this sort of case arose only in high society and was, accordingly, very exceptional. Our generation can no longer regard such cases as far-fetched.

3. The recognition of legal professional qualifications

The desired free movement of persons within the European Community has urged the European Community to issue a directive on the recognition of professional qualifications which have been obtained "abroad within Europe". [22] The directive, which should have been implemented in all the Member States of the European Community by 1st January 1991, is of general application and is therefore also concerned with legal professional qualifications. However, the European legislator has not closed its eyes to the fact that the various forms of legal education within the European Community are primarily aimed at the respective national legal systems. Lawyers can therefore, depending on the choice of the country in which an application is made for recognition of the professional qualification which has been obtained "abroad within Europe", be required to do a supplementary placement or an examination. [23] The European Directive just mentioned raises many questions, particularly in respect of legal qualifications. What is the legal situation if, as is the case with the Netherlands at present, a Member State has failed to implement the Directive? Is it open to a person seeking recognition of his or her foreign legal qualification to make his or her own choice between a placement or an examination, or must the qualification be recognised without a placement or an examination taking place? Can a solicitor or barrister ask for recognition of his or her legal qualifications and, upon the basis of this, start work as an "advocaat" or "Anwalt"? It is not difficult to conceive a multitude of this type of questions. Giving the answer is, as yet, not simple. [24] For the present purposes it suffices to conclude that the Directive on recognition will stimulate the different forms of legal professional education of the Member States of the European Community to "compete" with each other. This competition will cause the various forms of education to become comparable with one another to an extent greater than is the case today.

22. Directive of 21 December 1988 (89/48/EEG) on a general system of recognition of higher education degrees obtained as a result of at least three years of professional education; Official Journal L 19 of 24 January 1989.
23. C.f. Hildegard Schneider, Een klein stapje in de richting van echte "Europese" juristen?, Ars Aequi 1989, 368-374.
24. Forthcoming, Hildegard Schneider, Ph.D. Thesis, Maastricht 1992.

4. Studies abroad

More and more frequently students spend part of their study time abroad. This has been particularly stimulated by the so-called ERASMUS-program which was adopted by the Council of the European Community on 15th June 1987 [25]: the participating students receive a grant if they study for a period of at least three months at a university in another Member State of the European Community. A condition of eligibility for a grant is recognition by the home-university of the (part) examinations which have been taken abroad. A similar possibility to study at foreign universities is offered by the TEMPUS-program which has been initiated by the European Community for the benefit of students originating from Eastern European universities. [26] For law students these programs mean that part of their studies can be devoted to a legal system other than that of the country of their home-university. The conditions which are attached to the grant make certain that the knowledge acquired in those studies is relevant to the degrees of the visiting students.

The exchanges within the ERASMUS-program will, this academic year, be organised for the fifth time. It is true that, in principle, the program was of a temporary nature, but the enormous success of the exchanges will undoubtedly ensure that, by hook or by crook, these exchanges continue. Furthermore, it is of great importance for the European Community to ensure that a substantial proportion of academic graduates have had educational experience in more than one Member-State of the European Community. Accordingly, it is not surprising that the European Community has already decided to extend the ERASMUS-program by another five years. After ten years of exchanges an academic Europe without ERASMUS will have become unthinkable and for that reason the exchanges will have to become definitively embedded in the academic curriculum. Nevertheless, enthusiasm about the ERASMUS-exchanges cannot eliminate the fact that there may currently be substantial problems with regard to the recognition of the parts of the study which have been followed abroad. In some countries such recognition is not difficult to arrange within the framework of provision for examination. This applies, in particular, to countries in which academic legal education is examined in a series of small examinations. The small (part) examinations taken abroad can be accepted in place of small examinations which would have been taken at the home university. Difficulties arise in countries in which the academic legal

25. European Action Scheme for Mobility of University Students (ERASMUS).
26. Trans-European Mobility Scheme for University Studies (TEMPUS).

education is completed with one mammoth examination; knowledge acquired abroad tends to lack relevance to that final examination. We return to this problem in section 9 below. At this point it suffices to establish that the continuation of the ERASMUS-program will probably lead to a tendency for the legal education in the various member states of the European Community to assimilate.

5. A look forwards

In the light of the tendencies just indicated, it is possible to predict that, in forty to fifty years time, European legal students will be confronted with an education which is primarily orientated to legal rules which are identical or similar in all European countries. It will probably not matter very much where they follow their studies. Professional qualifications acquired by these students will be recognised throughout Europe; during their studies they will be free to spend several months in other European countries. (Part) examinations completed in a foreign European country will be a perfect substitute for (part) examinations which otherwise would have had to be completed in the home country. Probably a system of international "university-study-credits" will be in operation. Perhaps a period of forty or fifty years before this model comes into effect seems somewhat long. But the period is not gigantically long. Once it is realised that such is the period within which a person now commencing legal studies can expect to retire, the period falls into perspective. Those who replace our present first year students in the employment market will be the new-style European lawyers.

6. A glimpse from the future into the past

How will those future lawyers and legal students look back upon the legal education which they followed in the twentieth century? I fear that they will laugh sneeringly at the education, our education. They will consider the education offered to European lawyers in the twentieth century extremely provincial. This provincialism will be all the more striking, because legal education has not always been as it is now. Until the nineteenth century, the travelling of lawyers from one country to another in order to study at a university, was the most normal thing in the world. So much becomes clear, if we peruse the curriculum vitae of well-known lawyers, or the attendance lists of

universities. [27] For example, take a man such as Ulrich Huber (1636-1694) [28] who studied in Franeker, Utrecht and Marburg and obtained a doctorate from Heidelberg. He became professor at Franeker where his students were German, Scottish and English and even Dutch. In this way Huber's views on the "comitas" (comity), as the basis of private international law ("de conflictu legum"), were carried over the Dutch border. Not only students, but also university lecturers, were exceptionally mobile: such a man as Viglius van Aytta [29] was - before beginning a political career - professor in Padua and Ingolstadt.

In those days it was not national laws which were the central subject of university education, but received Roman law, which - at least in the whole of continental Europe - was treated as the "ius commune'. The codifications of the second half of the eighteenth century ended this central position of Roman law. [30] The fact that Latin lost its position as the "lingua franca" for lawyers also played its part in the demise of "European legal studies". Legal education became a strictly national affair. To study abroad became an activity for extravagant spirits and political refugees. In this connection, Rudolf von Jhering, speaking from the nineteenth century, said:

"The discipline of law has been degraded to national legal studies; the limits of legal study now coincide with political limits. A discouraging, unworthy form for an academic discipline." [31]

27. René David, Praticiens du droit en droit comparé, in: Konflikt und Ordnung, Festschrift für Murad Ferid zum 70. Geburtstag, München, 1978, 451, 452; Willem Zwalve, Het janushoofd van de rechtsvergelijking, Groningen, 1988, 13 and 16.
28. T.J. Veen, in: T.J. Veen and P.C. Kop (ed.), Zestig juristen, Zwolle 1987, 120-129.
29. T.J. Veen, in: T.J. Veen and P.C. Kop (ed.), Zestig juristen, Zwolle 1987, 104-109.
30. See, on this subject, inter alia, J. Spruit, Romeins recht, Terugblik en uitzicht, Deventer, 1988, 9-11. The idea of a "ius commune" was further damaged by a much quoted statement by Montesqieu, Esprit des Lois, Amsterdam/ Leipzig 1769, book one, chapter 3: "Les lois politiques et civiles de chaque nation... doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à une autre." Compare the English translation ("The spirit of laws") by Thomas Nugent (fifth edition, London, 1773), p. 9 "They should be adapted in such manner to the people for whom they are framed, that it is a great chance if those of one nation suit another."
31. "Die Rechtswissenschaft ist zur Landesjurisprudenz degradiert, die wissenschaftlichen Grenzen fallen in der Jurisprudenz mit den politischen zusammen. Eine demütigende, unwürdige Form für eine Wissenschaft." Cited from, "Geist des römischen Rechts", 10th →

It is appropriate to wonder what words Von Jhering would have used to judge legal studies of the twentieth century. The situation, with respect to the possibility to go further afield for a university education, in the Germany which Von Jhering knew, was not, by any means, disastrous. At that time Germany was still divided up into many independent countries, each with its own legal system. The tradition of studying at various universities was, in the last century, still followed in Germany. In this situation it was not uncommon to have studied in various universities situated in countries with vastly disparate legal systems. Furthermore, the body of German university lecturers remained able to move throughout Germany.

In other European countries the possibility for students and lecturers to study within more than one legal system was considerably more limited. However, the fact that many countries introduced codes, inspired by the French ones, exerted an important internationalising influence. This fact meant that the most important French legal publications (textbooks) were studied everywhere. Thus, in many respects legal studies in the nineteenth century were less provincial than in - at least, the first half of - the twentieth century. The increasingly provincial character of legal education manifested itself, particularly, in the fact that a professional qualification acquired in one country ceased to be recognised in other countries. Moreover, also university law lecturers lost the mobility to work in other legal systems.

It is highly probable that future lawyers will therefore conclude that, in contrast with the earlier period, the nineteenth and, above all, the twentieth century, were characterised by a provincial legal education. It is to be hoped that they will additionally observe that changes took place in the last two decades of the twentieth century.

7. A fresh look at the future

What will be the main features of the education given to law students of the twenty-first century? The basis of that education will be a new-style "ius

31. →
edition (reprint) Aalen 1968, 15. See also Bernhard Grossfeld, Macht und Ohnmacht der Rechtsvergleichung, Tübingen 1984, 15, with further references.

commune". [32] In the first place there will be principles and rules which are common, because they have been harmonised or even unified, to all countries in that future Europe. Further, there will be the many principles and rules which are common to the various systems because they stem from common historical roots; namely, that which was known earlier as the "ius commune". First year students will, accordingly, apart from subjects like legal history, [33] jurisprudence, [34] economics and other such subjects, be obliged to become acquainted with European institutional (perhaps: constitutional?) law, European private law, European administrative law, and European criminal law. In the study of the last-mentioned subjects the common basis of the law of the European countries, rather than the laws peculiar to the individual national systems, should be the focus of attention. [35]

32. Helmut Coing, Europaïsierung der Rechtswissenschaft, Neue Juristische Wochenschrift 1990, 939; Coing, European common law: historical foundations, in: Mauro Cappelletti (ed.), New perspectives for a common law of Europe, 1978; Hein Kötz, Gemeineuropaïsches Zivilrecht, Festschrift Zweigert, 1981,481; Cappelletti (ed.), New perspectives for a common law of Europe, 1978; see, further Marcel Storme, Lord Mansfield, Portalis of von Savigny?, Overwegingen over de eenmaking van het recht in Europa, in het bijzonder via de vergelijkende rechtspraak, Tijdschrift voor Privaatrecht 1991, 849-887.
33. J.E. Spruit, Romeins recht, Terugblik en uitzicht, Deventer 1988, 26, 27, asks for special attention to be given, in future legal education, to Roman law. Furthermore, in the present writer's view, the principal features of the history of codification and the history of the development of the Common Law are of great importance. Less important for the general part is that which we in the Netherlands used to refer to as " the old law of the fatherland" (oud-vaderlands recht). See, in this connection, R. Zimmermann, Das holländisch-römische Recht und seine Bedeutung für Europa, JZ 1990, 825-838; Imre Zaytay, La permanence des concepts du Droit romain dans les systèmes juridiques continentaux, Revue internationale de droit comparé 1966, 353; Helmut Coing, Von Bologna nach Brüssel, in: Europaïsche Gemeinsamkeiten in Vergangenheit, Gegenwart und Zukunft, 1989; Coing, Europaïsche Grundlagen des modernen Privatrechts, 1986; Coing, Ius commune, nationale Kodifikation und internationales Abkommen - Drei historische Formen der Rechtsvereinheitlichung, in: Le nuove frontiere del diritto e il problema dell'unificazione: Atti del Congresso internazionale di Bari, I, 1979, 171; Lajos Vékás, Erneuern und Bewahren in der Privatrechtsdogmatik (Vorträge, Reden und Berichte aus dem Europa - Institut Nr. 82, Saarbrücken 1987, 3; Heinz Peter Mansel, Juristenzeitung 1991,533.
34. Arend Soeteman, Rechtsfilosofie en rechtstheorie in Europees perspectief, R en R 1990/2.
35. To speak in the terminology of Zwalve, op cit., 9, " It is necessary precisely to stress the essentials which bind the European legal systems together, and to give less attention to the incidental features which bring about the differences between the legal systems." →

The words of Helmut Coing are relevant in this context[36]:

"We should fight for an organization of academic training in the field of law at our law schools in Europe, which instead of dividing the lawyers in Europe, tries to further mutual understanding. We must revise the idea which dominated legal education in the 19th century, that national legislation must be the basis of legal training. The curricula of our law schools must not be restricted to the study of national law, and not even to national law combined with a certain seasoning of comparative law. What is necessary and what we must aim for is a curriculum where the basic courses present the national law in the context of those legal ideas which are present in the legislation of different nations, that is, against the background of the principles and institutions which the European nations have in common".

Such an approach will have the result that a good basis of communication is established between the lawyers educated in the various European countries.[37] The mobility of lawyers - during as well as after their education - will be encouraged. Furthermore, the fact that legal education is somewhat distanced from the details of the (national) legal systems, will result in the acquisition of knowledge which is less vulnerable to be rendered out-of-date by one fell stroke of the legislator's pen.[38] In this connection the words of Neumayer should be remembered, who indicated the necessity to impart to fledgling lawyers, above all, a flexibility in legal thinking:

"Lawyers who presently receive their education at the university will be professionally active chiefly in the twenty-first century. Before they reach the age of retirement, large parts of the substantive law in which they were once educated will have disappeared into legal history. Accordingly they will be obliged to constantly adjust to new legal material. This adjustment will demand

35. →
See J.H. M. van Erp, Europees privaatrecht in ontwikkeling,: A.A. Franken e.a. (red.), Themis en Europa, Zwolle, 1989, 67; G.J.W. Steenhoff, Naar een Europees privaatrecht, in: J.B.J.M. ten Berge e.a. (red.), Recht als norm en als aspiratie, Nijmegen, 1986, 101.
36. Helmut Coing, European common law: historical foundations, in: Mauro Cappelletti (ed.), New perspectives for a common law of Europe, 1978, 44.
37. H.G. Schermers, Jurist van morgen, Nederlands Juristenblad 1991, 522.
38. See the words of J.H. von Kirchmann, Die Wertlosigkeit der Jurisprudenz als Wissenschaft, reprint, 1936, 35: "Drei Worte des Gesetzgebers, und ganze Bibliotheken werden zur Makulatur."

a sound legal culture and a flexibility in legal thought, for the acquisition of which comparative law is indispensable." [39]

8. The way ahead

After hearing this future music it is apposite to ask whether we should already be attempting to realise the European legal curriculum of the future. Should the students, who in this academic term place their first steps on the legal career-ladder by registration for an academic legal education, still be educated in the traditional - primarily orientated towards positive national law - manner? Because we have no radical alternative prepared, this will, in principle, be unavoidable. But does that also apply to the students who register next year, or in two or three years time? Is it not time to make radical changes to legal studies?

In respect of the changes necessary we can, in the first place, refer to the words of Neumayer just cited: legal studies will - up to a certain level - have to be uncoupled from the processes of teaching and examination of positive (national) law, and thus from knowledge which quickly goes out of date. This will certainly be - in September 1991 - an attractive idea to Dutch lawyers; on 1st January 1992 a new civil code will come into force. The relativity of the value of knowledge of positive law becomes very obvious at such moments. In other countries, the state of affairs is scarcely different: the law seems to change with ever-increasing rapidity.

If we, with an eye to the future of our students, separate legal studies from positive (national) law, we can, instead of the strictly positive law basis, forthwith, having regard to the increasing integration of Europe, proceed on the basis of provisions and approaches which are common to the European countries; namely, a "ius commune".

9. Legal barriers?

Will the national provisions on legal professional education permit such a step? The answer varies from one land to the next. First, the position in the Netherlands will be considered. In the Netherlands the so-called Universities Charter

39. Karl H. Neumayer, Rechtsvergleichung als Unterrichtsfach, Festschrift für Konrad Zweigert, Tübingen, 1981, 505.

(Academisch Statuut)[40] provides that an aspiring lawyer must complete examinations in Dutch law ("Nederlands recht") (also: Dutch private law, Dutch constitutional law, Dutch administrative law, Dutch criminal law and so on). If these examinations are completed with good results, such a law graduate has the possibility later of becoming a practising lawyer (advocaat) or a judge.[41] The explicit inclusion of the word "Dutch" appears, at first blush, to prevent the creation of a legal education founded upon European principles. First, it is nevertheless important to realise that such examinations are administered by, and under the responsibility of, the university. In the final resort, it is the university which determines how much knowledge of Dutch positive law is required. Secondly, it is, in the Netherlands, under discussion to abolish the Universities Charter, and thus to grant universities more freedom in the setting of examinations. Such reform would, in law faculties, first take effect, if the provisions of the Judicial Organisation Act (Wet Rechterlijke Organisatie) corresponding to those provisions in the Universities Charter, were also to be changed.[42] Finally it should be noted that it is, in the Netherlands, not especially difficult, by the inclusion of experimental-clauses in statutes, to obtain dispensation from provisions in the Universities Charter.[43]

In some other countries the situation is much more difficult. There are countries in which the contents of the academic examinations to be completed by aspiring lawyers are laid down in immense detail in statutes. Spain is a striking example. But, once again, in Spain it is the university which determines whether the statutory requirements have been fulfilled. The situation in Germany is considerably more difficult. It is true that aspiring lawyers follow a legal course at a university and take certain examinations at that university, but those examinations do not influence the result of a state examination which has to be taken at the end of the course of studies. The university examinations are

40. Art. 82 Academisch Statuut (23 June 1988, Stb. 315).
41. For both professions an extra professional qualification is necessary; the completed academic examinations are, for the professions conditio sine qua non. c.f. Art. 48 Wet Rechterlijke Organisatie and Art. 2 Advocatenwet. c.f. on legal education in the Netherlands: Gerard-René de Groot, Legal Education and the Legal Profession, in: Dutch Law for Foreign Lawyers, 2nd ed., Deventer, 1992.
42. The Judicial Organisation Act (De wet rechterlijke organisatie) refers expressly to examinations in "Dutch" private and commercial law etc. Contrast, however, Article 2 Advocates Act (Advocatenwet) which refers to examinations at a Dutch university, but the adjective "Dutch" does not further appear.
43. C.f. Wet Rijksuniversiteit Limburg (University of Limburg Act) of 3 December 1975, Stb. 717.

simply a condition of eligibility to sit the state examination. The examiners of the state examination are, in principle, not professors from one's own university. Some of the examiners are practising lawyers. In this model, universities deciding to adopt the new-style European legal education would achieve the result that their students would be less adequately prepared to take the state examination in which attention is almost exclusively directed to knowledge of German positive law. The universities, as such, cannot influence the contents of the state examinations.

The difficult position of German universities in the examining of legal students is also apparent in the recognition of examinations taken abroad (for example, within the ERASMUS-program). Recognition is not made by the home university, but by the Legal Examinations Authority (Landesjustizprüfungsamt). Furthermore, even if the examination taken is recognised, it still does not have any direct bearing upon the contents of the state examination. An examination taken abroad cannot be submitted in place of part of the state examination. By the same token, the material studied abroad is not examined within the state examination; thus the knowledge acquired is not permitted to exert any favourable influence upon the end-result. The foreign examinations are, in this respect, not treated differently from examinations taken at other universities within Germany; also in such cases the examinations taken do not influence the end-result of the state examination. A difference between, on the one hand, the examinations taken at the German universities, and, on the other hand, the foreign examinations, is that the German examinations were, more often than not, concerned with German positive law and, as such, provided a valuable preparation for the state examination. Summa summarum we can state that the study periods spent by German law students in foreign countries are, albeit enjoyable and intellectually challenging, in terms of the examinations which they are obliged to take, almost useless. This state of affairs must, in the not-too-distant future, change. Foreign legal examinations should, also in Germany, have direct consequences for the contents of the state examination. Statutory amendment is required.

In other respects German legal education is out of step: after the first state examination a German law student will commonly follow a two-and-a-half-year placement at one of various legal establishments. This legal training service (Justizvorbereitungsdienst) (in daily speech commonly referred to as trainee-periods (Referenda periode) is concluded by a second state examination which again is exceptionally strongly orientated towards German, positive law. Notwithstanding the possibility, within the framework of this trainee-period,

to do a three month placement abroad, such a Selected Post Abroad (Auslandswahlstation) has, again, no direct relevance to the contents of the state examination which must be taken at the end of the period of placement. Many a legal trainee has departed to his/her Selected Post Abroad (Auslandswahlstation) with a suitcase bulging with German law books, hoping, in preparation for the impending examination, to be at peace to read under palm trees.

Another evident disadvantage to the German legal educational system is its length. A student needs a total of eight or nine years in order, according to the normal German curriculum, to establish himself as a practising lawyer. In other European countries the time required is (sometimes remarkably) shorter. Now that professional qualifications acquired abroad must be recognised in Germany, there will be pressure to reduce the length of German legal education.

I have described the difficulties which have emerged in Germany so extensively in order to demonstrate that, before legal education in Germany can become more European, far-reaching statutory amendments are necessary. It is apparent, from the problems described above, that universities cannot be expected to take the initiating role. It is true that they can stimulate the discussion about the desirability for legal education to become more European, but it is, above all, essential that the entire system of state examinations is extensively amended. Otherwise German legal education will end up being completely isolated. [44] That this danger has also been spotted in Germany [45] is evidenced by the abundance of essays on the possibilities to reform legal education which have recently been published. The necessity for reform has, since the unification of Germany, only become greater.

10. Enough "ius commune"?

With political will the legal barriers can be overcome. If there is one area of law to which the adagium cited above, "Drei Worte des Gesetzgebers und

44. Compare Winfried Hassemer/Friedrich Kübler/Horst-Diether Hensen/Wolfgang Kramer/Jochen Abraham Frowein/Irene Lamb/Dieter Medicus/Ulrich Stobbe, Welche Maßnahmen empfehlen sich -auch im Hinblick auf den Wettbewerb zwischen Juristen aus den EG-Staaten- zur Verkürzung und Straffung der Juristenausbildung. Verhandlungen des 58. Deutschen Juristentages, München 1990, volume 1, E1-112, F1-142; volume 2, 11-92.
45. See C. Riezebos, Opleiding tot jurist in Duitsland en Nederland, NJB 1991, 536-544 with extensive references to the literature.

ganze Bibliotheken werden zu Makulatur" (Three words from the legislator, and entire libraries become waste-paper), applies, then it is the law of education. Accordingly it is appropriate to ask the following essential question: is there already enough European "ius commune" to fill a legal curriculum and a corresponding examination? I sincerely hope that this conference will shed more light upon this question. Without any doubt we can, in respect of commercial and company law, answer the question in the affirmative. Also in an area such as the general part of private law there are, by now, sufficient common features to be found.[46] But how can, on the basis of these common features, "communal law" be taught? Practically all textbooks and monographs are primarily concerned with one national law and make, at the most, some brief comparative excursions into other legal systems.

It will therefore be necessary to develop new teaching materials on a comparative law basis. With regard to the framework of these projected textbooks, I would like to quote Kötz[47]:

"It is vital in this respect to present, right from the beginning, the materials from a European perspective. It must not take a particular national system as a starting point, it should not address itself to a particular national circle of readers, and it should not be the primary purpose to give a contribution to the improvement of a particular national legal system. Right from the beginning such a textbook should rather take a stand beyond the national systems of law; moreover, it should, insofar as necessary, develop its own system and its own legal concepts. This is undoubtedly a difficult task, but comparative law research has by now reached a level which encourages me to be hopeful that this task is not impossible to perform."[48]

46. C.f. Heinz Peter Mansel, JZ 1991,532: "Sowohl als gesetztes als auch als Wissenschaftsrecht reift langsam ein Ius Commune Europae heran, das Stoff und Frucht einer europäischen Institutionenlehre, die auf rechtsvergleichen der Grundlage zu arbeiten hätte, sein könnte".
47. Neue Aufgaben der Rechtsvergleichung, Juristische Blätter 1982, 362; c.f. also Hein Kötz, Gemeineuropäisches Zivilrecht, Festschrift für Konrad Zweigert, Tübingen 1981, 498-500; c.f. also Jan Kropholler, Zeitschrift für vergleichende Rechtswissenschaft 1986, 155, 156; G.J.W. Steenhoff, Naar een Europees privaatrecht, in: J.B.J.M. ten Berge e.a. (red.), Recht als norm en als aspiratie, Nijmegen 1986, 90.
48. See, on the experience of developing an autonomous-comparative technique with accompanying legal concepts acquired in the planning phase of the International Encyclopedia of Comparative Law: Ulrich Drobnig, Methodenfragen der Rechtsvergleichung, Ius Privatum Gentium (Festschrift Max Rheinstein I), Tübingen 1969, 228-233.

We cannot but agree with Kötz when he alleges that the writing of such textbooks will be difficult. However, in many a field, important preparatory work has already been done. Insofar as private law is concerned, the monumental work of Zweigert and Kötz "Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts", second part, should be pointed out.[49] Furthermore, attention should be given to the second part of "Europäisches Privatrecht" by Coing[50] in which continental-European law between 1800 and 1914 is outlined. Authors of the proposed textbooks could derive further inspiration from the American-style "restatements" of European law, in which "European" rules and principles are developed and explained on a comparative basis. In this respect, the activities of the European Commission on the Law of Contract, which has already adopted the first drafts of a restatement of European rules about the performance of obligations and the consequences of non-performance, merit attention.[51] Ole Lando describes these European "restatements" as follows:

"As in a statute, each rule or principle is stated as an article. As in the American Restatements it is accompanied by a comment stating the reasons for the rule, its purpose, operation and relationship to other rules. The operation of the rule is also explained by the use of illustrations. In a footnote to the rule its background and source are mentioned, be it the common core of the legal systems of the Member States, one or several of the existing laws of the States, an international convention, the American Uniform Commercial Code, or some other source."[52]

The writing of textbooks based on common legal foundations would, furthermore, be made easier if, in respect of each field of law, sets of legal provisions were to be published which are valid in all, or many, (West) European

49. English translation by Tony Weir: Introduction to comparative law, volume II, The institutions of private law, second revised edition, Oxford 1987.
50. Helmut Coing, Europäisches Privatrecht, Band II, 19. Jahrhundert, Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern, München 1989.
51. Ole Lando, A contract law for Europe, International Business Lawyer 1985, 17-21; Lando, European contract law, Liber memorialis François Laurent, Brussel 1989, 55; see also Ulrich Drobnig, Ein Vertragsrecht für Europa, Festschrift Steindorff, 1990, 1149; Remien, Ansätze für ein Europäisches Vertragsrecht, Zeitschrift für vergleichende Rechtswissenschaft 1988, 117; Jan Kropholler, Zeitschrift für vergleichende Rechtswissenschaft 1986, 155, 156.
52. Ole Lando, European Contract Law, American Journal of Comparative Law 1983, 653-659.

countries: international treaties containing uniform provisions, European regulations and directives, the considerations which form the core of the most important case law of the European Court on Human Rights and, possibly, important recommendations and resolutions of the Council of Europe. These sets would amount to a sort of "Corpus iuris Europeanum" which could be referred to in textbooks and during teaching. It would be a cause for rejoicing if such a Corpus could be produced for each field of law (general provisions of private law, law of contract, the law applying to incorporated and unincorporated legal bodies, criminal law, the law of criminal procedure, family law and the law of children) in all languages of the Community.

It would be desirable if, in respect of each field of law, a collection of the relevant legislation (in particular, of parts of the codifications) of all European Member States were to be published. Such collections have been looked upon with disdain since the beginning of this century. In the middle of the previous century such collections were published in the field of private law and commercial law, particularly by Antoine de Saint Joseph. At the time these collections were immensely popular and were very influential[53]. For decades the drafting of collections has been viewed as an inferior form of comparative law. This view is justified, but only if nothing further is done. A collection is, on the other hand, extremely useful to provide first access to an unknown legal code. Naturally, legal provisions taken out of their context cannot be studied without taking account of the applicable case law and literature. One should, however, not forget that in many legal systems statutes are the primary source of law. Collections of statutes in each field of law could play an important role in teaching; by reference to such publications it can frequently be demonstrated that the provisions in many codes are broadly similar to one another. Sometimes they can be used to illustrate that identical or almost identical statutory wording does not inevitably imply an identical interpretation. In particular the collections are handy for the quick retrieval of relevant legislative texts from foreign countries.

It is exactly this last point that I would like to emphasise. As Europe becomes more completely integrated it is necessary that we can take quick stock of

53. For instance, I am sure that the famous comparative notes by Vélez Sarsfield on the Argentinian "Codigo civil" were drafted on the basis of de Saint Joseph's comparative statute collections. Only in this work could the numerous citations by Vélez Sarsfield from the civil codes of Sardinia, Naples, Louisiana and the Netherlands (!) have been traced with any ease.

provisions of other European countries applicable to a particular field of law. Anyone attempting today to obtain up-to-date editions of the statute-books in the field of private law of the European Member-States on his or her office desk will, in most university towns, probably experience great difficulty. If there were a comparative statute collection it would only be necessary to reach into the cupboard. Will the production of such a collection be exceptionally expensive? It seems to me that the pure technical production in this age of word-processors, CD-ROM discs and scanners no longer needs to be extremely expensive. A large print run, it is to be hoped, should exert a favourable influence upon the price.

The proposed statute collections could, furthermore, stimulate research in the field of comparative legislative technique (comparative style of legislation). Such research is of great importance now that increasingly more provisions have to be drafted so as to be applicable to all Member-States. [54] Furthermore such research should be combined, or at least closely connected, with research into the methods of interpretation of statutes typically used in the various Member-States.

11. Textbooks

On the basis of the material just indicated, introductory textbooks will have to be developed. It would not be unthinkable to first develop the books for use as teaching material in optional subjects and subsequently to make the books suitable for use in the first and second academic years. It could also be attempted to write such teaching material for first year law students; such task offers a great intellectual challenge. The development of such introductory texts is, in my opinion, not a task which should be entrusted to a large comparative law committee. Such committees are extremely useful for the putting together of restatements, corpus iuris Europaeum and comparative statutory collections. The writing of a textbook is, however, a matter for one person or for a group of people working closely together in teaching.

A most desirable scenario would be that diverse people from various European countries would work separately on such introductory texts. In this connection, I emphasise that I do not consider it sensible that the same textbook (possibly

54. See, for example, the interesting study by Timothy Millet, A comparison of British and French legislative drafting (with particular reference to their respective nationality laws), Statute Law Review 1986, 130-160.

translated into the various languages) should be used throughout the whole of Europe. [55] It is sufficient that the texts are similar in the sense that they are not about positive national laws, but rather about the common European foundations. If, for every field of law, there were to come a multiplicity of introductory texts, competition between the texts will ensure that their academic level is high. In that connection it is desirable that the European Community or the Council of Europe would finance the translation of each such text into a language other than the language of the legal system of the author. Furthermore, the offering of an annual prize for a textbook based upon general principles and which accordingly is suitable for use in all Member-States could be expected to have a stimulating effect.

12. Miscellaneous

The drafting of suitable teaching material is the most essential step which must be taken if progress is to be made from the present-day, to more European, legal curricula. Apart from this other decisions are necessary, some of which of an extremely practical nature. I would like to touch upon some of these points here.

If legal education throughout Europe were to be based upon the same principles, then it should become possible to perform one's entire study abroad or, during the course of studies, to move from one country to another. The mobility, so typical for students in the Middle Ages and the Renaissance, could, after centuries, once again be possible. What consequences will such mobility have upon a student's grant and the level of university fees which a student is expected to pay? Students who go abroad as part of the ERASMUS-program do not lose any part of their student grant. Does the same apply if a student "simply" goes abroad, not under the ERASMUS-program, but in order to study in a foreign European country? Can a student opt to begin the study abroad and, within the framework of ERASMUS, to pay a visit to his or her country of origin? In the event of an affirmative answer, what consequences will it have for the student grant? And what consequences do the various

55. As suggested by H.G. Schermers, Jurist voor morgen, Nederlands Juristenblad 1991, 521, "It must be possible to put together, for first year students, textbooks which could be used in all Member-States of the European Community. It is likely that the European Community, or Council of Europe, will be prepared to translate such textbooks into all the community languages....(522)... In the first place there is the need for identical textbooks for the whole of Western Europe."

possibilities have upon the obligation to pay university fees? In Germany university fees are around thirty pounds; in the Netherlands around six hundred pounds. It is no idle speculation to suppose that the answer to these practical questions will exert a strong influence upon the mobility of future European students. Comparative studies on the funding of university education and university fees are therefore to be welcomed and should enjoy a high priority.

Another practical point merits, in this context, attention: the duration and the division of the academic year is quite different in the various European countries. These differences are unfavourable to mobility. Harmonisation is desirable.

Financial hurdles influence the mobility of students. Financial limitations appear also to obstruct the potential mobility of professors. First, it will be no surprise to learn that there are enormous differences in the salaries of professors in the various European countries. It is idle dreaming to expect that someone with a chair in a country which pays well will move to grace a less well-paid chair abroad. Even more serious is the fact that, even if the salary is the same or higher, nevertheless there can be detrimental financial consequences in respect of eventual pension payments. In most countries professors are civil servants, so that, if a professor moves to take up a similar function abroad, the disruption to pension rights which thereby arises is extremely complicated. Accordingly it is desirable to make provision, at the European level, for the pension rights of such civil servants performing an educational function.

The new-style European legal education courses will necessitate law libraries different from those which are generally available. Most law libraries consist of a large, native collection in respect of the relevant national positive law and, a much smaller, collection of legal materials on foreign legal systems. In the law library of the future foreign legal materials must be easily accessible. In the Maastricht library, for example, I need to be able to consult recent Spanish legislation and complementary parliamentary documents. New technical developments mean that it is no longer necessary to have the documentation physically in the library. A connection via computer-terminal with Spain, or a CD-ROM-disc containing Spanish legislation will now make it possible for the documents to be consulted in Maastricht.[56] Such facilities are, at the

56. See de Banco de datos juridicos de Colex Data, reported in the information journal of Tapia May/June 1991.

moment, very expensive. The way in which, for the benefit of foreign law faculties, special financial arrangements can be made, must be investigated.

In this connection it would be desirable to establish a documentation centre containing draft statutes and accompanying parliamentary documentation from all Member-States of the European Community. Every law faculty should have access to the centre. The material in the centre would be retrieved via a system of key words. Naturally, it should be possible to consult this - multiple-language - key-word-system via a computer-terminal. The existence of such a documentation centre should have a harmonising effect upon the legislation emanating from the various European countries, because legislative draftsmen (and researchers) would be enabled, in a much simpler way than is currently the case, to keep themselves informed of each other's ideas, as well as the relevant pros and cons.

13. Conclusion

In the foregoing I have indicated many problems which will have to be tackled and resolved if we wish to bring a real European course of legal studies to fruition. It will not be difficult to point to many more snakes lying in the grass. It is one of the objectives of this conference to identify the difficulties, and to exchange ideas with one another about possible solutions. In our discussion of the problems, let us not lose sight of the fact that our legal education *must* change, if our students are to be adequately equipped to perform their function as lawyers in future Europe. The legal education based only upon national law will no longer be in existence by the time that the youngest delegates at this conference retire. Let us hope that these youngest conference delegates, when delivering their retirement speeches, will not be obliged to state, that we, in 1991, missed our chance. [57]

57. With thanks to Caroline Forder for the translation of the paper.